Supreme Court, U.S.
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Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES REGAN FORGETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
From An Appeal to The United
States Court Of Appeals For
The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court below erred in concluding it was without subject matter jurisdiction when a servicemember files an action under the Federal Tort Claims Act where Army medical personnel negligently administered improper medical care?

(a) Whether the rules of statutory construction were violated?

(b) Whether *Feres* was decided contrary to legislative intent?

II. Whether this Court should depart from *stare decisis* and overrule *Feres v. United States?*

III. Whether the *Feres* doctrine is unconstitutional as violative of the Petitioner's civil rights?

PARTIES TO THE PROCEEDINGS

1. Petitioner is James Regan Forgette. Mr. Forgette was Plaintiff in the District Court and Appellant in the Court of Appeals for the Tenth Circuit.

2. Respondent, United States of America, was the defendant in the District Court and Appellee in the Court of Appeals for the Tenth Circuit.

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Petition for Writ Of Certiorari
From an Appeal To the United
States Court Of Appeals for
The Tenth Circuit

James Regan Forgette petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Decision of the United States Court of Appeals for the Tenth Circuit was entered on August 26, 1994 and appears at

p. 1a of the Appendix to this Petition.

The Decision of the United States District Court for the Western District of Oklahoma granting defendant's Motion to Dismiss for lack of subject matter jurisdiction. Judgment was entered on February 15, 1994. It appears at p. 4a of the Appendix.

Petitioner filed an administrative FTCA claim with the United States Army on October 29, 1992. (See Appellant Brief in Chief) The United States Army denied the claim in writing on May 5, 1993. It appears at p. 14a of the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 26, 1994. The Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Petition is filed within Ninety (90) days after such Order,

as permitted by Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall...be deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner, James Regan Forgette, was given full medical clearance for active duty in the United States Army on January 1, 1991 without any physical impairments or limitations. On January 23, 1991, Petitioner was sworn into the United States Army. At the time of the injury, Petitioner was stationed at Fort Sill, Comanche County, State of Oklahoma and was not

engaged in combatant activities.

The Petitioner consented to a biopsy but the military doctor/surgeon without Petitioner's consent or knowledge completely removed a much greater amount of tissue including nerves. To correct the problems he has been treated while on convalescent leave at Military Hospital and at Veterans's Hospitals (most with negligent treatment). The complete history is found in the Appendix at p.p. 16a-37a. Major Vales, as well as all subsequent physicians, was acting in an official capacity. They were acting within the scope of employment on behalf of the United States Government when the injuries occurred. Petitioner has had to undergo several surgeries in an attempt to correct the problem caused by the negligence of Respondent' physicians.

Petitioner filed his First Amended

Complaint in the Western District of Oklahoma on December 14, 1993. (Appendix p. 8a). The District Court dismissed the action for lack of subject matter jurisdiction. (Appendix p. 4a) On Appeal, the Tenth Circuit affirmed the dismissal. The Tenth Circuit held that the District Court was without subject matter jurisdiction. (Appendix p. 1).

REASONS FOR GRANTING THE WRIT

I.

This case involves an important issue of Federal law pertaining to the prohibition against servicemembers bringing tort claims against the government for non-combatant injuries received while in the military. In the proceedings below, the United States relied upon the doctrine announced in *Feres v. United States*, 340 U.S. 543, 547, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950) as being a total bar to

Petitioner's claim.

This case poses a direct conflict between the express language of the statute and the Court's interpretation. Section 1346(b) of Title 28 on its face renders the United States liable to all persons, including servicemembers, injured by the negligence of Government employees. (Emphasis added). Congress specifically considered, and provided what it thought necessary for, the particular needs of the military. First, Congress provided that the terms "Federal agency" included the military and that "employee of the government" included members of the military. 28 U.S.C.A § 2671. These inclusions mean that a servicemember may bring a claim under the FTCA against the military. Second, Congress exempted certain circumstances in which servicemembers may not bring a claim under the FTCA. Those

exemptions are (a) "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war, 28 U.S.C.A. §2680(j)and (b) "[a]ny claim arising in a foreign country 28 U.S.C.A. § 2680(k). There is nothing in the legislative history of the original drafters which would indicate that Congress intended to exclude servicemembers entirely.

The FTCA provides several exemptions. However, no exemption categorically preclude Petitioner's claim. The *Feres* Court reached its decision by creating an additional exemption to the FTCA and thus revising the plain language of the statute. That Court held that the government was not liable under the FTCA for injuries to servicemembers where the injuries arise out of or are in the course of activities

"incident to service." *Feres* at 146.[1] There are no words in the FTCA stating this exemption. Congress not only failed to provide such an exemption, but positively omitted it.

This Court should reexamine the longstanding statutory construction of *Feres*. Under the rules of statutory construction, the Supreme Court's task is to give effect to the will of Congress. Where Congress' will has been expressed in plain terms, that language must ordinarily

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[1]For more than forty years, the courts have used the *Feres* doctrine to perpetuate a practice of unjustifiable and intentional discrimination against servicemembers based on the language of an Act that was without force and effect at the time *Feres* was decided. The language "incident to service" evolved from the Military Personnel claims Act, 31 U.S.C. §223b (Appendix at pp. 74a-82a). Section 223b was repealed by the Federal Tort Claims Act of July 3, 1943, C. 189, 57 Stat. 372; U.S.C., Title 31, Secs. 223b, 223c, and 223d *repealed by* Federal Tort Claims Act of 1946, c. 753, §424, 60 Stat. 842, 846-847 (Appendix at pp. 42-45

be considered as conclusive. *Negonsott v. Samuels*, ____U.S.____, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993). See, *Reves v. Ernst & Young*, ____U.S.____, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). The *Feres* Court disregarded the familiar rule of construction that expressio unius est exclusio alferius. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180,1185, 113 L.Ed.2d 134 (1991), quoting *Andrus v. Glover Construction Co.*, 446 U.S. 608,616-17, 100 S.Ct. 1905, 1910-11, 64 L.Ed.2d 548 (1980). Implying another exemption is precisely what the *Feres* Court did. In a statutory construction case, it is imperative that the language of the statute

be the beginning point. When the statute speaks with clarity to the issue, judicial inquiry into the statute's meaning is ended. *Estate of Cowart v. Nicklos Drilling Co.*, ____ U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). Therefore, necessarily the *Feres* Court modified or amended the Federal Tort Claims Act. If the FTCA is to be amended, then that is a function of Congress and not the Courts.

The plain language of the FTCA recognizes "any claim." (emphasis added) Therefore, the FTCA, as written, allows Petitioner's claim. The *Feres* Court improperly placed the restriction that precludes claims by servicemembers construed to be "incident to service." In *United States v. Brooks*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), the Fourth Circuit was reversed when it held that all members of the armed services are by

implication excluded from coverage of the Federal Tort Claims Act. *Id.* The *Feres* Court violated the rules of statutory construction making its reading of the FTCA manifestly incompatible with the unambiguous language of the statute.

Representative Emmanuel Celler, the author of the FTCA, made congressional intent quite clear when he learned of the Forth Circuit's decision.[2] By the author's

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[2]Note, Military Personnel and the Federal Tort Claims, Act, 58 Yale L.J. 615 (1949) n. 26.

Representative Celler's statement, delivered orally to the YALE LAW Journal on November 26, 1948, is as follows:

"The opinion of the Fourth Circuit is utterly erroneous when its says that it was the intent of Congress to exclude a member of the Armed Forces from the benefits of the Tort Claims Act. I am the author of the bill...I never intended to preclude suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensation, pensions, hospitalization, preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort claims Act. We start off with the proposition in general

own words, Congress never intended to exclude servicemembers from coverage under the FTCA. Hence, the decision in *Feres* was an expansion of legislative intent.

It has been stated that if Congress had disagreed with the reading in *Feres*, then Congress should have enacted new law. Congress has spoken. The meaning of the FTCA is clear on its face. A servicemember is authorized to bring an action against the Government for an injury sustained unless the action falls within the class of one of the *enumerated* exemptions. There can be no question about the authority granted under this statute. The *Feres* doctrine is a judicial creation, therefore

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that the government deliberately removes the defense of sovereignty, except in the cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The Court cannot read the exceptions in the law."

its validity should be addressed by this Court. Traditionally, this Court has been slow to alter decisions concerning statutory construction, however, decisions involving statutory construction, even decisions which Congress has previously declined to overrule, have been overruled by this Court. *See, Girouard v. United States*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084, overruling *United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889; *see also, Commissioner of Internal Revenue v. Estate of Church*, 335 U.S. 632, 69 S.Ct. 322, 337, 93 L.Ed. 288, overruling *May v. Heiner*, 281 U.S. 238, 50 S.Ct. 286, 74 L.Ed. 826. *Feres* was based on speculation that Congress could not have meant what it explicitly wrote. The *Feres* Court advanced three reasons for its holding. First, the private liability required by the FTCA was absent. *Feres* at

141-142. Second, Congress could not have intended that local tort law govern the distinctively federal relationship between the Government and servicemembers. *Id.* at 142-144. Third, Congress could not have intended to make FTCA actions available to servicemembers who have already received veterans' benefits to compensate for injuries suffered incident to service. *Id.* at 144-145. A fourth rationale was added some years after *Feres:* Congress could not have intended to permit actions for service-related injuries because they would excessively interfere with military discipline. *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 99 L.Ed. 139 (1954). None of the rationales successfully articulates a clear basis for prohibiting Petitioner's action.

Title 28 § 2674 provides that the United States is liable under the FTCA in

the same manner and to the same extent as a private individual under like circumstances. The logic of the first rationale is since no private individual can raise an army, and since no State has consented to suits by members of its militia, § 2674 shields the Government from liability in the *Feres* situation. *Feres* at 141-142. Under this reasoning, many of the Act's exceptions are useless. Fortunately, the Court recognized this fatally flawed logic and totally rejected the "parallel private liability" rationale. *See, Rayonier, Inc. v. United States*, 350 U.S. 315, 319, 76 S.Ct. 359, 100 L.Ed 392 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69, 76 S.Ct. 122, 100 L.Ed. 48 (1955). The Supreme Court in *United States v. Shearer*, 473 U.S. 52, 58 described the second rationale as no longer controlling. *Id*. The reasoning proceeds as

follows: Liability under the FTCA depends upon the law of the place where the injury occurred. Congress could not have intended local and geographically diverse, tort law to control major aspects of the "distinctively federal" relationship between the United States and service-members. Policy nor principle can justify the second rationale in patently disregarding the unambiguous words of the FTCA. *United States v. Johnson,* 481 U.S. 681, 695, (Scalia, J., dissenting)(1987). *Feres* was concerned with the unfairness to servicemembers in making recovery depend upon where the injury arose. *Feres* at 142-144. However, "[n]onuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery. *Johnson* at 695-696. The second rationale is not indicative of congressional intent, nor is it a justification for implying an

exemption that was not drafted into the statute. The third reason is no longer controlling. *United States v. Shearer, supra*. The Court assumed that the Veterans' Benefit Act (VBA), 72 Stat. 1118, as amended, 38 U.S.C. § 301 *et seq*. (1991 and Supp. 1994), was the sole remedy for servicemembers injured or killed in the line of duty. In *Brooks*, the Court noted that "nothing in the Tort Claims Act or the veterans' laws...provides for exclusiveness of remedy" and the Court refused to "call either remedy...exclusive when Congress had not done so." *Brooks* at 53. Therefore, this rationale has no credibility since both before and after *Feres*, the Supreme Court has allowed injured servicemembers to bring actions under the FTCA even though they had received compensation under the VBA. *Johnson Supra*. at 697. The fourth rationale that suggests that Petitioner's action

would require the courts to second-guess military decisions is not tenable. Servicemembers can now sue for malpractice on behalf of dependents with no obvious breakdown in military discipline. There is no reason to believe that allowing servicemembers to sue on their own behalf will undermine military discipline. When Representative Frank of Massachusetts moved for passage of a bill to modify the *Feres* doctrine allowing servicemembers a cause of action for medical malpractice. He strongly criticized the military discipline argument.[3] Some actions perhaps will

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[3] In the words of Representative Frank:

> The one argument we have heard against this is that it would be subversive of discipline because enlisted personnel would be allowed to sue officers. I do not favor giving a private or sergeant the right to defy an order from a captain, but...if after emerging from an anesthetic and being diagnosed as having

adversely affect military discipline. But the effect upon military discipline is not so definite, or so absolutely substantial that it justifies the Court holding that Congress did not mean what it unambiguously expressed in the FTCA. *Johnson* at 699.

Because *Feres* was decided by the Court

> been the victim of malpractice, a private is allowed in an orderly process to bring a lawsuit against the captain or major who performed the operation. I do not for the life of me see how discipline is undermined.
>
> If the argument is that the enlisted personnel will somehow infer that their officers are not infallible, I say to those who worry about it, "It is too late. They already know that."
>
> There is no right here for any enlisted personnel to defy a superior officer, to confront a superior in an unbecoming manner. It simply allows this legal process.

135 CONG. REC. H3225 (daily ed. June 27, 1989)(statement of Rep. Frank).

misapplying the FTCA and rendering a decision contrary to legislative intent, *Feres* was incorrectly decided. Accordingly, the *Feres* doctrine does not operate as a bar to Petitioner's claim. The interpretation of the FTCA in *Feres* is violative of the rules of statutory construction. If the FTCA is applied as written, then this Court should find that the Tenth Circuit erred in concluding that it did not have subject matter jurisdiction under the FTCA where Army medical personnel negligently administered improper medical care.

II.

It is crucial that the Court review this case in order to correct a fallacy in an interpretation of a federal statute that is an important component of our Government's policy of being held accountable for the torts of its employees.

The Government exercised an extreme degree of wrecklessness when it admitted doctors who fell substantially below the standard of care of a reasonably prudent doctor acting under like circumstances. The Government should be held accountable. The *Feres* doctrine denies Petitioner his opportunity to *seek* redress for his injuries. Negligent actions have never been barred based on the status of the injured party. In the present case, Petitioner enlisted in the Army as a vibrant and physically fit man. He was declared a fit soldier with no limitations. He could work and provide for his children. Petitioner has endured several surgeries and has to endure several more in an attempt to correct Respondent's negligence. Respondent's negligence has caused Petitioner irreparable harm and Respondent should be held accountable. The facts of

this case are extraordinary. In equity and fairness, Petitioner asks this Court to review this case. Otherwise, because of Petitioner's military status, he is left without recourse. Certainly, Congress did not intend this result. In the case before this Court, the policies in favor of departing from *stare decisis* far outweigh those suggesting adherence.

In earlier cases, when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, this Court has chosen not to compound the original error, but to overrule the precedent. *See, Swift & Co. v. Wickham,* 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); *Continental T.V. Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

Correcting the unfairness and irrationality that *Feres* has bred is

justification enough to depart from *stare decisis*. *Johnson*, at 703. Since its inception, *Feres* has been nothing but a creature of continuing chaos and bedlam, both in academic writings[4] and in the

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[4]Bennett, The Feres Doctrine, Discipline and the Weapons of War, 29 ST LOUIS U. L.J. 383 (1874) ('disciplinary considerations that underlie the {Feres} doctrine in fact demand its reversal.') Schwartz, Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine, 95 YALE L.J. 992-99 (1986) (overly) restrictive Feres doctrine should be replaced to allow claims against more serious misconduct; Comment, The feres Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?, 44 PITT. L. Rev. 929, 952-53 (1983) (courts indiscriminately dismiss claims by servicemembers by improperly analyzing Feres and its underlying policies); Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 MICH. L. REV. 1099, 1099-1100, 1102 (1979) Feres doctrine unnecessarily deprives military personnel of redress for harms in the name of policies already fulfilled by express exceptions to FTCA.

Federal Courts.[5] The great weight of scholarly opinion has been critical of the decision, *supra*, n. Footnote 5. Hence, contemplations of *stare decisis* should not stand in the way of remedying a decision that hinges on such feeble foundations.

This Court has overruled statutory precedents in a multitude of cases. *Patterson v. McLean Credit Union*, 485 U.S. 617, 108 S.Ct. 1419, 99 L.Ed.2d 879 (1988). *See, e.g., Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132,

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[5]"See, e.g., *Sanchez v. United States*, 813 F.2d 593, 595 (CA2 1987); *Bozeman v. United States*,780 F.2d 198, 200 (CA2 1985); *Johnson v. United States*, 74a F.2d 1530, 1532-35 (11th Cir. 1985) (reviewing history and development of Feres doctrine and noting "widespread almost universal criticism of it), aff'd on reh'g. 779 F.2d 1492 (em banc), cert. granted, _____ U.S. _____, 107 S.Ct. 59, 93 L.Ed.2d (1986). *Scales v. United States*, 685 F.2d 970, 974 (CA5 1982), cert denied, 460 U.S. 1082 (1983); *LaBash v. United States Dept. of Army*, 668 F.2d 1153, 1156 (CA10), cert. denied, 456 U.S. 1008 (1982)

96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) overruling *Auto Workers v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S.484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), overruling *Ahrens v. Clark*, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed 1898 (1949); *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972) overruling *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941); *Boys Market, Inc. v. Retail Clerks*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962). The Court's overruling of precedents did not mean that the Court was callous toward considerations of *stare decisis*, but rather that the Court

recognized it as " `a principle of [485 U.S. 619] policy and not a mechanical formula,'" *Boys Market*, supra, at 241, 90 S.Ct. at 1587 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940)(Frankfurter, J.). Even though it appears that *Feres* was reaffirmed in *Johnson*, supra, a closer reading will demonstrate that *Feres* missed being overruled by one vote. There were four Justices ready and willing to correct the unfairness and irrationality of *Feres*. The time is <u>now</u> to right this manifest injustice. For the above foregoing reasons, this Court should depart from *stare decisis* and overrule *Feres v. United States* or in the alternative modify the *Feres* doctrine to allow malpractice claims.

III.

The Court's review of this case is further required because the Circuit

Court's decision violates Petitioner's right to equal protection as guaranteed by the Fifth Amendment. The *Feres* doctrine as it relates to servicemembers is unjustifiable discrimination. *Johnson* at 695-696. *Feres* is wholly inconsistent with society's inmost commitment to the elimination of class-based discrimination. An entire class of American citizens have been subjected to intentional unequal treatment. Providing servicemembers with the same rights as civilians will enhance morale by eliminating their second-class citizenship.[6] In order to survive an equal protection challenge of class-based discrimination, the statute must be substantially related to an important governmental objective. A classification must be reasonable, not arbitrary, and must

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[6] H.R. REP. No. 87, 101 Cong., 1st Sess. 4 (1989).

rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all person similarly situated shall be treated alike. *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). There is no justification for discrimination against the military personnel. *Johnson* at 695-696. The Government cannot meet its burden of articulating that the *Feres* doctrine is substantially related to an important Governmental objective. Therefore, the *Feres* doctrine is unconstitutional as violative of the Petitioner's civil rights.

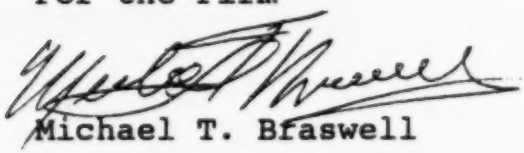
CONCLUSION

The Petition for Writ of Certiorari should be granted, the *Feres* doctrine should be expressly overruled or in the alternative modified to allow medical malpractice claims and the Judgment below

should be reversed.

Respectfully submitted,

Braswell & Associates, Inc. P.C.
For the Firm



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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 1994, a true and correct copy of the foregoing Petition For Writ of Certiorari with Appendix Attached was mailed, postage prepaid, to the following:

Vicki Miles-LaGrange
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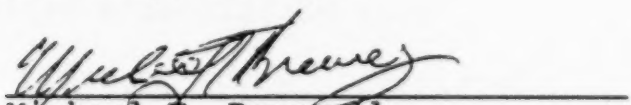
Oklahoma City, OK 73102



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UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
From An Appeal to The United
States Court Of Appeals For
The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT OF MAILING

This Petitioner's Petition For Writ of Certiorari with Appendix Attached was mailed, first class, postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on

November 22nd, 1994, from the United States Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73102.

Michael T. Braswell
3621 N. Kelley, Suite 100
Oklahoma City, OK 73111
405/232-1950

STATE OF OKLAHOMA,)
) SS.
COUNTY OF OKLAHOMA.)

Subscribed and sworn to before me this 22nd day of November, 1994.

Barbara Braswell
Notary Public

My Commission Expires October 19, 1997.

Filed August 24, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES REGAN FORGETTE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 94-6079
	)	
UNITED STATES OF AMERICA,	)	(D.C. No. 93-1925-A)
	)	
	)	(Western District of
Appellee.	)	Oklahoma)
	)	

ORDER AND JUDGMENT*

Before SEYMOUR, Chief Judge, MCKAY and BALDOCK, Circuit Judges

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The parties have agreed that this case

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

may be submitted for decision on the briefs. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.2. The case is therefore Order submitted without oral argument.

This is an appeal from a district court's order dismissing Plaintiff's medical malpractice action brought under the Federal Tort Claims Act. The alleged malpractice occurred during a biopsy at the Reynolds Army community Hospital at Ft.Sill, Lawton, Oklahoma, while Plaintiff was on active duty in the United States Army. The district court dismissed the action for lack of subject matter jurisdiction on the basis that Plaintiff's claims were barred by the United States Supreme Court's holding in Feres v. United States, 340 U.S. 135 (1950).

On appeal, Plaintiff essentially urges us to strike down or significantly modify

the Feres doctrine, a doctrine created by the United States Supreme Court in 1950, and one that has been the law of the land ever since. In dismissing Plaintiff's action, the district court noted that it had no authority to overturn decisions of the United States Supreme Court. We affirm for substantially the same reasons given by the district court.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Monroe G. McKay
Circuit Judge

Filed February 15, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES REGAN FORGETTE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV-93-1925-A
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

O R D E R

This is a medical malpractice action concerning the alleged severance of a nerve during a biopsy performed at the Reynolds Army Community Hospital at Ft. Sill, Lawton, Oklahoma, while plaintiff, James Regan Forgette, was on active duty in the United States Army.[2] The matter is

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[2] An Administrative claim was filed on October 29, 1992, raising only the treatment of plaintiff while on active duty. Denial was mailed on May 5, 1993, and this action was filed within six months on October 29, 1993. Plaintiff filed an

presently before the Court on the Motion to Dismiss For Lack Of Jurisdiction Or For Failure To State A Claim, Or In The Alternative For Summary Judgment, filed by defendant, United States of America, on December 21, 1993.[3] Plaintiff has filed a response in opposition thereto, and the motion is at issue.

Defendant moves the court to dismiss this action for lack of subject matter jurisdiction on the basis that plaintiff's claims are barred by the United States Supreme Court's holding in Feres v. United States, 340 U.S. 135 (1950). In response, plaintiff requests the Court to strike

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amended complaint on December 14, 1993.

[3] As this matter can be resolved solely on the pleadings, the Court will treat this motion as a motion to dismiss for lack of subject matter jurisdiction.

down, eliminate or modify the Feres doctrine.

The Feres doctrine bars lawsuits under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 2671-2680, brought by service members against the government for injuries that "arise out of or are in the course of activity incident to service." Feres, 340 U.S. at 146; Madsen v. United States ex rel. United States Army, 841 F.2d 1011, 1012 (10th Cir. 1987). Clearly, plaintiff's complaint and amended complaint, which allege that plaintiff was injured while undergoing a biopsy while he was on active duty in the Army, arises under the FTCA. See 28 U.S.C. § 1879(b)(1) (FTCA is exclusive remedy for personal injury arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the

scope of his employment). Even more clearly, plaintiff's injury, which he sustained while on active military duty, was incident to his military service and is therefore barred by the Feres doctrine. The court rejects plaintiff's request that the Court "either strike down/or eliminate or modify the Feres doctrine, which was created by case law." Pl.' Obj. at 1. Indeed, the Feres doctrine was created by the Supreme Court.

Accordingly, defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED. This action is hereby DISMISSED WITH PREJUDICE.

It is so ordered this ____ day of February, 1994.

WAYNE E. ALLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JAMES REGAN FORGETTE,	)
	)
Plaintiff,	)
	)
vs.	) Case No.
	) CIV-93-1925A
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)

FIRST AMENDED COMPLAINT

Comes now the Plaintiff and for his First Amended Complaint against the Defendant alleges and states:

1. This First Amended Complaint is filed prior to an answer or other pleading being filed by the Defendant. Pursuant to FRCP Rule 15 this amended Complaint can be filed without first obtaining leave of this Court.

2. That Plaintiff realleges all allegations in the original Complaint as if restated herein and thus further alleges the facts and allegations stated herein.

3. This action arises under the Federal Tort Claims Act, and this Court has jurisdiction under the provision of 28 U.S.C.A. § 1346(b).

4. Plaintiff, at the time of the initial Tort, was stationed at Fort Still, Comanche County, State of Oklahoma.

5. On or about March 7, 1991, James Regan Forgette was taken into surgery. At that time, Mr. Forgette was in initial recruit training as an active duty member of the United State Army when the initial procedure was performed. Because of the procedure performed on Mr.Forgette, all follow-on procedures required/precipitated. The Plaintiff consented to a biopsy, but

the surgeon without his consent completely removed a considerably greater amount of tissue including nerves.

a. The various follow-on procedures were performed at United States Military Hospitals or at Veterans Administration (VA) Hospitals.

b. The procedures and/or wrongful acts by the medical personnel of the United States Department of Medicine were performed when the Plaintiff was either on medical leave, medical convalescence leave, leave, leave awaiting medical disability discharge proceedings or after he was discharged.

c. The events in chronological sequence as experienced and

written by Plaintiff is prepared in his own words and attached as Exhibit "A" which is incorporated herein by reference.

6. The physicians performing the procedures were acting in an official capacity and were acting within the scope of their employment on behalf of the united States when the procedures and acts were performed and done.

7. The Plaintiff filed the required administrative claim and has exhausted the administrative remedies as shown by Exhibit "B".

8. The Plaintiff, as a result of the mal-practice of the Defendant's medical doctors, has had to undergo many medical procedures and most probably will require addition procedures. The requirements for all these additional medical procedures

were not known at the time the claim was initially filed and therefore the additional problems must now be included and the claim is hereby increased to $10,000,000.00.

WHEREFORE, premises considered, the Plaintiff prays for judgment against the Defendant as follows:

1. Damages in the amount of $10,000,000.00;

2. Continuing medical treatment for all the conditions created by the mal-practice of all doctors;

3. Cost and other relief this Court

deems just and proper.

BRASWELL & ADJEI
For The Firm

MICHAEL T. BRASWELL, OBA #1082
3621 North Kelley, Suite 100
Oklahoma City, OK 73111
(405) 232-1950
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 1993, a true and correct copy of the FIRST AMENDED COMPLAINT was mailed postage pre-paid to:

M. Kent Anderson
Asst U.S. Attorney
201 West Park
Oklahoma City, OK 73102

Michael T. Braswell

Tort Claims Division
93-CO1-T023

Mr. James Regan Forgette
3033 16th Street North
St. Petersburg Florida 33704

Dear Mr. Forgette:

This notice contitutes final administrative action on your claim against the United States in the amount of $1,000,000 allegedly due to improper medical treatment at Reynolds Army Community Hospital, Fort Sill, Oklahoma on March 7, 1991.

The claim is denied. At the time and place in question you were a member of the United States Army on active duty. The medical care you received was incident to your service. A claim arising incident to your service is excluded from consideration under the Federal Tort Claims Act by viture of a decision of the United States Supreme Court. *Feres v. United States,* 340 U.S. 135 (1950).

Because of the above cited bar to suit, this Service has not conducted any claims investigation into the merits of the claim. Therefore no conclusion is expressed as to whether the claim is otherwise

payable. However, the claim has been referred to Army medical authorities in order to ensure that a quality assurance review has been or will be conducted in accordance with existing directives and procedures.

I am required by regulations to inform you that if you are dissatisfied with the action taken on your claim, you may file suit in an appropriated United States District court no later than six months from the date of mailing of this letter or your remedy will be forever barred. This is not intended to imply that any such suit, if filed, would be successful.

Sincerely,

William C. Kirk
Lieutenant Colonel, U.S. Army
Chief, Tort claims Division

This Exhibit was dated May 5, 1993

910102 I JAMES REGAN FORGETTE WAS GIVEN FULL MEDICAL CLEARANCE FOR THE U.S. ARMY. AT THAT TIME I HAD NO PHYSICAL IMPAIRMENTS OF ANY KIND.

910123 I WAS SWORN INTO THE U S ARMY AS A PHYSICALLY FIT SOLDIER. I WAS SENT TO FT. SILL OKLAHOMA WITH NO PHYSICAL LIMITATIONS. AND WAS ASSINGED TO ALPHA BATTERY 1/19. THE FIRST SEVERAL WEEKS WERE UNREMARKABLE, TRAINING WAS GOING VERY WELL. I SEEMED TO BE A VERY MOTIVATED SOLDIER WITH AMPLE POTENTIAL TO BE A LEADER AMONG THE OTHER TROOPS.

910205 MY FIRST SYMPTOMS OF A COLD HAD APPEARED AND I WAS SEEN AT BRAVO 1/19 FOR COLD SYMPTOMS. GOING FROM ST. PETE. FLORIDA TO FT. SILL OK IN JANUARY I HAD DEVELOPED A COMMON COLD. I CONTINUED TO TRAIN AND ACCELED WHILE TREATING THIS COLD WITH TYLENOL AND COUGH DROPS.

910222 I WAS SEEN AT T.M.C. #2 FOR WHAT WAS NOW A UPPER RESPIRATORY INFECTION. I WAS PLACED ON ANTI BIOTICS AND TWO DAYS BED REST AND TO RESUME FULL DUTY ON 190225.

910225 I RESUMED FULL DUTY STILL FEELING DIZZY WITH COLD SYMPTOMS, SHORTNESS OF BREATH, HEADACHES AND NAUSIA.

910303 I AWOKE WITH A LEFT NECK MASS THAT HAD DEVELOPED OVER NIGHT. I WAS TAKEN TO REYNOLDS ARMY COMMUNITY HOSPITAL BY SGT. FOWLER, ONE OF MY UNITS DRILL SERGEANTS. THE DOCTOR IN THE EMERGENCY ROOM TOLD ME I HAD COLD SYMPTOMS AND RELEASED ME BACK TO MY UNIT. WHILE WAITING FOR MY DRILL SERGEANT TO PICK ME UP I HAD WENT TO USE THE REST ROOM IN THE HOSPITAL. AT WICH TIME I HAD PASSED OUT TWICE WHILE IN THE REST ROOM. I HAD LET THE E.R. NURSE KNOW WHAT HAD HAPPENED. AT THAT TIME I WAS

PLACED ON AN I.V. OR SALINE SOLUTION, FOR DEHYDRATION. I WAS RELEASED AN HOUR LATER TO MY UNIT, AND TOLD IF THE MASS WAS STILL PRESENT IN A.M. TO RETURN TO REYNOLDS HOSPITAL.

910304 I AGAIN WOKE UP AND THE MASS WAS STILL PRESENT SO I WAS SENT TO T.M.C. #2 AND SAW MAJOR BURRELL WHO SENT ME BACK TO REYNOLDS HOSPITAL FOR A C.T. SCAN. THE C.T. SCAN WAS DONE AND MAJOR VALES READ THE SCAN. AT THAT TIME MAJOR VALES SAID HE HAD NEVER SEEN ANYTHING LIKE IT BEFORE. AT THAT TIME MAJOR VALES WANTED TO RELEASE ME BACK TO MY UNIT. AT THAT TIME THE RADIOLIGST HAD TOLD MAJOR VALUES THAT SHE FELT I SHOULD BE ADMITTED FOR FURTHER OBSERVATION. MAJOR VALES THEN ASKED ME WHAT TYPE OF TRAINING WE WERE DOING I TOLD HIM BACIC RIFLE MENUVERS. HE ASKED ME IF I FELT THIS COULD HAVE BEEN CAUSED BY FIRING THE WEAPON. I HAD TOLD HIM NO AS I AM RIGHT HANDED AND THE MASS WAS IN THE LEFT SIDE OF THE NECK. I TOLD MAJOR VALES THAT OTHER THAN THE COLD I HAD HAD SINCE MY ARRIVAL I HAVE ALWAYS BEEN IN GOOD HEALTH. AGAIN MAJOR VALES STATED HE FELT I SHOULD BE RELEASED TO MY UNIT. AGAIN THE RADIOLIGST STRONGLY SUGESTED I BE ADMITTED. ALTOUGH MAJOR VALES SEEMED RELUCTANT HE DID ADMIT ME. I WAS PLACED ON I.V.S AND KEPT UNDER OBSERVATION FOR THE NEXT TWO DAYS.

910306 AFTER NO RELIEF FROM THE I.V.S MAJOR VALES DISCUSSED DOING A BIOPSEY OF THE MASS. I WAS TOLD ALL THAT WOULD BE DONE IS, " A HALF INCH INCISION, TAKE A TISSUE SAMPLE, AND SEW IT BACK UP."

090307 SURGERY WAS DONE THIS DATE. WHILE HAVING THE DRESSING CHANGED THAT EVENING I HAD ASKED THE NURSE HOW IT

LOOKED, THE SCAR,. SHE SAID IT WAS A FEW INCHES LONG AND I HAD THOUGHT SHE WAS KIDDING. I WAS IN A GREAT DEAL OF PAIN AND WAS MORE CONCERNED WITH FEELING BETTER TO START TO WORRY. MAJOR VALES STATES AT THIS TIME HE HAD TO REMOVE MORE OF THE MASS THEN EXPECTED.

910309 WHILE MAJOR VALES WAS MAKING ROUNDS I HAD TOLD HIM I HAD SOME NUMBNESS OVER THE LEFT SIDE OF MY FACE AND EAR. MAJOR VALES AID "I MAY HAVE DAMAGED OR SEVERED SOME NERVES IT IS A DIFFICULT AREA WITH ALL THE MUSCLE NERVES AND THE SIZE OF THE MASS. DONT WORRY THEY WILL GROW BACK. " THIS COMMENT WAS MADE FRONT OF MY HOSPITAL ROOM MATE PVT.BOBBIT.

910311 I WAS RELEASED FROM THE HOSPITAL FOR 14 DAYS OF CONVALESCENT LEAVE. AT WICH TIME MY BROTHER CAME TO PICK ME UP FROM AMARILLO TEXAS SO I COULD SPEND MY LEAVE WITH HIM AND HIS FAMILY BACK IN TEXAS. I STARTED TO FEEL ALOT MORE PAIN IN THE LEFT SIDE OF THE NECK AND SOME WEAKNESS TO MY LEFT SHOULDER. I ALSO NOTICED I WAS UNABLE TO RAISE MY LEFT ARM ABOVE MY HEAD. THESE CHANGES HAD DEVELOPED OVER THE FIRST SEVERAL DAYS OF MY LEAVE TIME.

910317 MY SYMPTOMS WERE GETTING WORSE SO I PHONED REYNOLDS ARMY COMMUNITY HOSPITAL AT FT. SILL AND TALKED TO A NURSE ABOUT WHAT I WAS FEELING. SHE SAID SHE WOULD TALK TO MAJOR VALES AND CALL ME BACK. SHE CALLED BACK AND SAID MAJOR VALUES SAID WHAT I WAS FEELING WAS NOT UNUSAL AND FOR ME NOT TO WORRY.

910325 I RETURNED TO R.A.C.H. TO GET PERMISSION TO RETURN TO MY UNIT. STEPING OFF THE ELEVATOR ON THE 3RD FLOOR I SAW MAJOR VALES, AT THAT TIME I SHOWED HIM

THAT I WAS UNABLE TO RAISE MY LEFT ARM ABOVE MY HEAD, I ALSO TOLD HIM I WAS STILL IN A GREAT DEAL OF PAIN. MAJOR VALES STATED " I PROBALLY SEVERED SOME NERVES THERE IS NO NEED TO WORRY THEY WILL PROBALLY GOWN BACK. "I RETURNED TO MY UNIT, ALPHA BATTERY 1/19 ON PROFILE. I WAS TOLD TO DO NO LIFTING RUNNING JUMPING ECT. AT THIS TIME MY TRAINING STOPPED.

910328 I RETURNED TO T.M.C. #2 DUE TO CONTINUING PAID AND LOSS OF FUNCTION. I WAS SEEN BY LT. COL. WOREMAN. HE REFERED ME TO A DR. PARKS AT R.A.C.H. TO HAVE A E.M.G. STUDY DONE. DR. PARKS TOLD ME AT THE END OF THE TEST THAT IT MAY BE TO SOON TO GET THE FULL FINDINGS. DR. PARKS SAID IT TAKES ABOUT THREE WEEKS OR SO FOR A NERVE TO SHOW LOSS OF FUNCTION OR "DIE".

910329 I RETURNED TO T.M.C. #2 FOR PHYSICAL THERAPY AT LT.COL.WOREMANS REQUEST. TREATMENT WAS STARTED WITH ULTRA SOUND WITH HEAT. THIS CAUSED A INCREASE IN PAID, AND MUSCLE SPASM AND WAS CONTINUED FOR THE NEXT FEW DAYS.

910401 I REQUESTED, FROM CPT. CARNEY MY BATTERY COMANDER, PERMISSION TO USE THE BASE GYM TO BE ABLE TO SWIM IN THE POOL TO TRY TO HELP MYSELF FEEL BETTER. THE TIME I SPENT IN THE POOL SEEMED TO LOSEN UP THE SHOULDER A LITTLE AND PROVIDED SOME SHORT TERM RELIEF.

APPROX. 910404 I WAS HAVING LUNCH WITH TWO OTHER SOLDIERS I HAD BECOME FRIENDS WITH, WHEN WE SAW MAJOR VALES IN THE HOSPITAL CAFETERIA. I SAID HELLO AND MAJOR VALES ASKED "HOW ARE YOU DOING" AND I SAID NOT TO WELL. HE ASKED ME IF I WAS STILL IN ALOT OF PAID. I SAID YES AND THAT OTHER DOCTORS FELT HE MAY HAVE CUT SOME NERVES.

HE SAID " I TOLD YOU I PROBALLY DID SEVER SOME NERVES , AND THEY WILL GROW BACK." I THEN TOLD HIM THAT I WAS STILL HAVING A HARD TIME MOVING MY SHOULDER. MAJOR VALES THEN TURNED AND WALKED AWAY. I FELT I GOT THE COLD SHOULDER FROM HIM FROM THAT DAY FOWARD.

910408 I WENT BACK TO THE TROOP MEDICAL CLINIC #2 TO TALK TO MAJOR BURRELL ABOUT THE LACK OF CARE I WAS RECIEVING FROM MAJOR VALES. UNTIL THIS POINT ALL MAJOR VALES HAD TOLD ME WAS TO BE PATIENT " IT TAKES TIME FOR THEM TO GROW BACK." MAJOR BURRELL COULD UNDERSTAND MY FRUSTRATION AND CALLED MAJOR VALES. I LEFT THE OFFICE WHILE THEY TALKED AND COULD HEAR MAJOR BURRELL RAISING HIS VOICE TELLING MAJOR VALES TO MAKE THE TIME TO SEE ME. I SAW MAJOR VALES LATER THAT DAY.

I ARRIVED AT MY APPOINTMENT TO BE GREETED BY MAJOR VALES TELLING ME" I AM HEAR TO ANSWER YOUR QUESTIONS AND SHE IS HEAR TO KEEP YOU CALM AND PROVIDE A SMILE," POINTING TO A FEMALE ASSISTANT IN THE ROOM AT THE TIME. AT THIS TIME AN APPOINTMENT WAS SET TO SEE A DR. WOOSLEY A NEUROSURGEON IN THE AREA. AND THE APPOINTMENT WAS SET FOR THREE WEEKS LATER DUE TO DR. WOOSLEYS FULL SCHEDULE.

910429 I WAS SEEN BY DR. WOOSLEY IN HIS OFFICE IN LAWTON OK.. AT THE END OF THIS VISIT HE TOLD ME HE WAS UNABLE TO MAKE A PROPER EVALUATION WITHOUT ANOTHER E.M.G. STUDY AND A PATHOLOGISTS REPORT. DR. WOOSLEY ALSO SAID THE DAMAGE WAS VERY EVIDENT BUT WITHOUT THESE STUDIES THE EXTENT WAS UNCLEAR. I WENT BACK TO THE HOSPITAL, R.A.C.H., AND WAS ABLE TO OBTAIN THESE DOCUMENTS.

910430 I RETURNED TO THE HOSPITAL TO THE SURGICAL WARD AT THE NEW HOSPITAL FOR MY FOLLOW UP VISIT WITH MAJOR VALES TO FIND HE HAD BEEN RELEASED FROM ACTIVE, AS HE WAS A RESERVEST ACTIVATED OVER THE GULF CRISIS. AFTER BEING TOLD HE HAD LEFT I ASKED TO SEE THE CHIEF OF STAFF, WHO HAD JUST RETURNED FROM THE GULF, DR. SMITH. AFTER A PHYSICAL EXAM BY HIM HE SAID HE WOULD MAKE ARANGEMENTS FOR ME TO BE MEDEVACED TO FT. SAM HOUSTONS BROOKE ARMY MEDICAL CENTER AND BE SEEN BY A TEAM OF NEUROSURGEONS THERE.

910509 I WAS ADMITTED TO THE NEUROSURGERY WARD OF BEACH PAVILLION HOSPITAL AT B.A.M.C.

910410 UPON A BED SIDE EXAM IT WAS THOUGH MY # 11 CRANIAL NERVE WAS COMPLETELY SEVERED AS WELL AS MY GREATER AND LESSER OCIPITAL NERVES. THE # 11 CRANIAL NERVE MOTORS THE UPPER , MID , AND LOWER TRAPEZIUS WICH ALLOWS YOU TO RAISE THE ARM GREATER THAN 90 DEGREESE. THE LESSER AND GREATER OCIPITAL NERVES PROVIDE THE SENSE OF TOUCH TO THE LEFT SIDE OF THE FACE AND SIDE OF THE HEAD AND EAR. SO A E.M.G. STUDY WAS ORDERED. AND THE RESULTS PROVED THEIR FINDS QUITE NICELY. AT THIS POINT I WAS TOLD BY A DR. KLEIN , A MAJOR IN THE MARINE CORP., HE WOULD BE ABLE TO RECONNECT THE NERVES BY USING THE SERIAL NERVE FROM MY LEFT LEG. AFTER SOME PREOPERATIVE COUNSELING I AGREED TO HAVE THIS PROCEDURE DONE IN HOPE TO REGAIN THE MUSCLE FUNCTION I HAD LOST DR. KLEIN AND ASURED ME HE HAD SAT IN ON ABOUT A DOZEN SURGERIES LIKE MINE AND HAD DONE A COUPLE HISSELF. HE TOLD ME I HAD A 60% TO 70% CHANCE OF A COMPLETE RECOVERY.

910520 I WENT TO THE O.R. FOR A FIVE HOUR SURGERY WHERE THE SERIAL NERVE OF THE LEFT LEG WAS HARVESTED TO DO A CABLE GRAFT TO RECONNECT THE # 11 CRANIAL NERVE. I WAS TOLD IT WOULD BE SIX MONTHS TO ONE YEAR BEFORE THE FULL RESULTS WOULD BE KNOWN AS IT TAKES THAT LONG FOR NERVES TO REGENERATE.

090526 I WAS MEDEVACED BACK TO FT. SILL OK. WHERE I WAS RELEASED FOR 30 DAYS OF CONVELESCENT LEAVE. AND TO RETURN TO FT. SAM TEXAS AFTER MY LEAVE FOR A MEDICAL BOARD FROM THE ARMY.

UPON MY RETURN TO FORT SAM, WHILE WAITING FOR MY BOARD I STARTED PHYSICAL THERAPY FOR MY SHOULDER MUSCLES AND LEG SCARS. THERAPY CONSISTED OR RANGE OF MOTION EXERCISES WITH LIGHT WEIGHT TO THE LEFT SHOULDER. AS WELL AS DEEP MUSCLE MASSAGE TO ALL SCARS. I HAD A FIVE INCH SCAR ON MY NECK AFTER THE CABLE GRAFT. AND TWO SCARS ON MY LEFT LEG ALSO, ONE ACROSS MY ANKLE, AND ONE JUST BELOW MY CALF MUSCLE, BOTH ABOUT TWO AND A HALF INCHES LONG. WITHEN THE WEEKS TO FOLLOW I DEVELOPED A VERY STRONG SHOCKING SENSATION IN MY LEFT FOOT WHILE WALKING.

PAULA FERGUSION, MY PHYSICAL THERAPIST AT FT. SAM, TOLD ME THE SENSATION I WAS FEELING WAS THE START OF A NEUROMA. IT WAS THEN EXPLAINED TO ME THAT NEUROMAS ARE FORMED FROM NERVES THAT HAVE IRREGULAR GROWTH PATTERNS FORM. THE ONLY TREATMENT WAS TO HAVE IT SURGICALY REMOVED. I HAD ALSO STARTED TO FEEL THE SAME SYMPTOMS IN THE LEFT NECK AT THE GRAFT SITE. I ALSO STARTED TREATMENT FOR A CONSTANT HEADACHE I HAD SINCE MED MARCH 1991.

91 SEPTEMBER THE WEEK OF THE 20TH. I

WENT BACK TO THE O.R. AT B.A.M.C. TO HAVE THE NEUROMA REMOVED FROM HE LEFT LEG. IT WAS DONE ALMOST ON AN OUT PATIENT BASIS. I WAS ADMITTED THE EVENING BEFORE THE SURGERY AND WENT TO THE O.R. THE FOLLOWING DAY. I AM NOT SURE TO THE DATE AS THIS WAS THE ONLY TREATMENT THAT NEVER MADE IT INTO MY MEDICAL RECORDS. THE PROCEDURE WAS SIMPLE, THE NERVE WAS LOCATED AND THE CALF MUSCLE WAS SEPERATED TO THE BONE AND THE NERVE WAS PLACED VERY DEEP NEXT TO THE BONE. I WAS DISCHARGED SEVERAL HOURS LATER ON THE SAME DAY.

911001 I WAS DISCHARGED FROM ACTIVE DUTY FROM THE U S ARMY AND PLACED ON THE TEMPORARY DISABILITY RETIREMENT LIST UNTIL THE RESULTS OF THE CABLE GRAFT WERE KNOWN. IT WAS ESTIMATED IT WOULD TAKE SIX MONTHS TO ONE YEAR FOR THE FULL RESULTS. BY THE MIDDLE OF DEC. 91 I HAD REDEVELOPED THE NEUROMA IN THE LEFT LEG AND THE ONE IN THE LEFT NECK HAD GAINED MASS AND SENSITIVITY. I CONTACTED DR. KLEIN AT B.A.M.C AND SET AN ADMISSION TO B.A.M.C. FOR THE 8TH OF JANUARY 1992.

920108 I WAS ADMITTED TO B.A.M.C. FOR FOLLOW UP TREATMENT FOR THE NEUROMA IN THE LEFT LEG AS WELL S THE EXPECTED NEUROMA IN THE LEFT NECK REGION OF THE GRAFT SITE.

920109 I UNDERWENT ANOTHER E.M.G. STUDY WICH SHOWED A SLIGHT BE INERVATION TO THE UPPER MIDDLE AND LOWER TRAPEZIUS. IT WAS FRLT AT THIS TIME THAT THE AMOUNT OF RE INNERVATION GAINED WAS ALL TO BE EXPECTED. IT WAS ALSO FELT THAT I WAS VERY LUCK TO HAVE THE RE INNERVATION I DID.

910115 I WENT BACK TO THE O.R. AT B.A.M.C. FOR THE EXCISION OF THE LEFT CRANIAL NERVE NEUROMA, A PIECE OF NERVE WAS

DISECTED FROM THE CABLE GRAFT SITE AND A THREE AND A HALF INCH FATE GRAFT WAS TAKEN FROM THE LEFT FLANK OF MY BODY TO WRAP AND PAD THE NERVE AS WELL. MY CALF WAS ALSO OPENED AND THE SURAL NERVE WAS AGAIN EXCISED OF THE NEUROMA. IT WAS ALSO TREATED WITH AN ALCOHOL INJECTION, AGAIN BURIED IN THE CALF MUSCLE, AND THE INCISION CLOSED. I WAS TO FOLLOW UP WITH DR. KLEIN IN TWO TO THREE MONTHS. I WAS RELEASED BACK TO MY HOME IN FLORIDA.

I SHOULD ALSO MENTION PRIOR TO THE MILITARY I HAD WORKED IN THE SEAFOOD INDUSTRY FOR THE BETTER PART OF SEVEN YEARS. MY JOBS RANGED FROM WHOLESALE MANAGEMENT TO COMMERCIAL FISHING FROM NEW FOUNDLAND TO THE GULF OF MEXICO. NEEDLESS TO SAY I WAS A VERY HEALTH, MUSCLAR YOUNG MAN, USED TO PHYSICALLY AGRESSIVE WORK AND LONG DAYS. MY WORK HAS ALWAYS BEEN A HIGHLIGHT IN MY LIFE, AND I TOOK GREAT PRIDE IN MY JOB. AFTER MY DISCHARGE FROM THE MILITARY FINDING A JOB WITH MY HEALTH PROBLEMS WAS VERY DIFFICULT. I APPLIED TO ANY JOB I COULD DO, MY FIRST JOB WAS WITH A SEAFOOD COMPANY THAT HAD OFFERED ME A JOB BEFORE I JOINED THE MILITARY. I WORKED FOR THEM FOR WEEKS BEFORE I HAD TO QUIT DUE TO THE PARALISIS IN THE LEFT SHOULDER, AND AN INCREASE IN PAID. THE JOBS THAT WOULD FOLLOW WERE FAST FOOD TO LIGHT DUTY SALES JOBS THAT DID NOT PAY VERY MUCH. I ALSO HAD TO MOVE BACK HOME WITH MY PARENTS AFTER ALMOST 10 YEARS IN INDEPENDENCE. NOT ONLY WAS MY LIFE TURNED UPSIDE DOWN BY THE PHYSICAL CHANGES BUT MY LIVELY HOOD HAD BEEN STRIPPED AWAY AS WELL. AS A DIVORCED FATHER OF TWO CHILDREN ONE OF THE HARDEST THINGS FOR ME TO DO AS A FATHER WAS TO

EXPLAIN TO MY KINDS THAT I WOULD NEVER BE ABLE TO PLAY WITH THEM THE WAY I USED TO AGAIN. I SAW MYSELF LOSING CONTROL OF EVERY ASPECT OF MY LIFE AND IT SEEMED TO BE OUT OF MY HANDS. IT WAS SHOULD GO WITHOUT SAYING EVERY ASPECT OF MY LIFE AND BEEN CHANGED BY THIS POINT.

FROM MY DISCHARGE IN OCTOBER 1991 TO PRESENT MY MEDICAL FOLLOW UP THROUGH THE BAY PINES V.A. HOSPITAL IN ST. PETE. FLORIDA HAS, IN MY OPION, BEEN LESS THAN STANDARD. DUE MOSTLY TO THE LACK OF KNOWLEDGE, MOST THE DOCTORS I HAVE HAD TO DEAL WITH CANT EVEN UNDERSTAND MY TYPE OF PROBLEMS. SO TO TRY TO EXPLAIN ALL IVE BEEN THROUGH WITH CONFUSED DOCTORS, AND DOCTORS WHO HAVE NO KNOWLEDGE OF MY SITUATION, IT HAS NOT BEEN A VERY PRODUCTIVE TWO PLUS YEARS AS FAR AS MY RECOVERY IS CONCERNED.

920701 I HAD BEEN STILL EXPERINCING ALOT OF PAIN AND DISCOMFORT IN THE LEFT NECK WITH MINIMAL RELIEF FROM THE JANUARY 1991 SURGERY. 920701 I AGAIN WAS FLOWN BACK TO B.A.M.C. FOR ANOTHER PROPOSED SURGERY ON THE LEFT NECK TO TOTALLY REMOVE THE DISEASED PORTION OF THE # 11 CRANIAL NERVE. IT WAS PLANED FOR 920706. ON THE EVENING OF THE 5TH THE CHARGE NURSE TOLD ME THAT DR. KLEIN CANCELED THE SURGERY FOR THE 6TH. I WAS THEN TOLD THAT THE PROPOSED SURGERY WOULD BE TO RISKY, AND THAT I NEEDED TO TRY STEROID INJECTIONS. TWO DAYS LATER I WAS SEEN IN THE PAIN CLINIC AT B.A.M.C. TO HAVE A STELATE GANGLION BLOCK DONE IN THE LEFT NECK. DR. KLEIN HAD DONE SEVERAL LOCAL TRIGGER POINT INJECTIONS IN THE PAST TO TRY TO " DEADEN THE NERVE " ALL OF THE SHORTS THAT WERE DONE BY DR. KLEIN

WERE DONE IN HIS OFFICE AND ONLY ONCE THE SHOTS WERE RECORDED INTO MY RECORDS. BUT THE RESULTS OF THE SHOTS HAD NO LASTING RELEIF THAT WAS WHY SURGERY WAS PLANNED FOR THE 6TH. THE RESULTS OF THE STELATE GANGLION BLOCK WERE NO MORE SUCCESSFUL THAN THE ONES ADMINISTERED BY DR. KLEIN. I WAS ALSO TRIED ON MEDICATIONS FOR THE PREVIOUS YEAR TO TRY TO DESENSITIZE THE NERVES AS WELL, WITH NO RELIEF. I WAS DISCHARGED NEAR THE END OF JULY 1992 FROM B.A.M.C.. BEFORE MY DISCHARGE DR. KLEIN TOLD ME HE WOULD MAKE ARANGEMENTS FOR ME TO GO ANYWHERE I NEEDED TO FOR ANY ON GOING PROBLEMS. AT THAT TIME I FELT SURE THAT THE RESIDULES OF THE SURGERY DR. KLEIN HAD DONE HE WAS NOT SURE HOW TO TREAT THEM AND HE WAS WASHING HIS HANDS OF THE WHOLE CASE. AT THIS POINT I WAS SENT BACK TO FLORIDA TO A STAFF OF DOCTORS AT THE V.A. WHO HAD NO IDEA HOW TO TREAT ME, OR MY CONDITION. MOST OF ALL THE DOCTORS I HAD SEEN OUTSIDE B.A.M.C. HAD NEVER HEARD OF THE TYPE OF CABLE GRAFT I HAD DONE ON ME, AND THE ONES THAT HAD HEARD OF THIS PROCEDURE HAD LITTLE TO NOTHING TO SAY ABOUT IT. SOME HAD EVEN EXPRESSED THAT THEY THOUGHT IT TO BE REDICULOUS.

9208 ? I STARTED TO DEVELOP LOW BACK PAIN FOR NO APPARENT REASON AND IT WAS WORSENING VERY RAPIDLY. THE FIRST M.R.I. WAS DONE IN SEPTEMBER OF 1992. NOT ONLY WAS MY NECK GETTING WORSE, BUT THE FILMS SHOWED A NARROWING OF THE L-3, L-4 DISC. I HAD NOT SUFFERED ANY TRAUMA TO MY BACK SO TO ME THE SITUATION WAS TOTALLY BAFFELING. NOONE COULD TELL ME WHY OR HOW THIS COULD HAVE HAPPENED. THE ONLY THING LOGICAL TO ME WAS THE LACK OF INERVATION MUSCLES TO

THE LEFT SIDE OF THE BACK, BUT MY DOCTORS AT THE V.A. ASSURED ME THAT WAS NOT THE CASE. ALTOUGH NO SUFFICIENT TESTING WAS EVER DONE THIS WAS RULED OUT FROM THE GET GO.

930402 I HAD AN APPOINTMENT WITH DR. PALAY, SET UP BY MCDILL AIR FORCE BASE, FOR MY T.D.R.L. EVALUATION FOR THE DEPT. OF THE ARMY. DR. PALAY IS A NEUROLOGIST IN TAMPA THAT TAKES REFERALS AS MCDILL HAS NO NEURO DEPT. DR. PALAY CONDUCTED THE EXAM AND THE RESULTS WERE BASED ON ONLY WHAT HE SAW AT THE TIME OF THE EXAM HE WOULD NOT ANSWER ANY QUESTIONS I HAD ABOUT MY HEALTH. I FELT IT WAS A VERY RUSHED IN AND OUT OFFICE VISIT. BASED ON DR. PALAYS OPINION I WAS FOUND FIT FOR DUTY BY THE U.S. ARMY ON 930413. I MIGHT ADD I STARTED COUNSELING FOR POST TRAUMATIC STRESS DISORDER, A CONDITION I HAD BEEN DIAGNOSISED FOR FROM THE V.A. UPON MY DISCHARGED FROM THE ARMY, IN NOVEMBER OF 1992. I HAD THOUGHT I HAD TAKEN ALL THE NEGATIVE TURNS I COULD POSSIBLY TAKE AND NOW THE ARMY WAS TELLING ME I WAS FIT FOR DUTY. THIS WAS RATHER IRONIC DUE TO THE LETTER OF DENIAL FOR THE TORT CLAIM I HAD FILED SIX MONTHS EARLIER. I APPEALED THE FINDS OF THE ARMY AND REQUESTED A FORMAL HEARING AT THE PHYSICAL EVALUATION BOARD AT FORT GORDON GEORGIA.

930411 I WAS HOSPITALIZED AT JAMES A. HAILEY HOSPITAL IN TAMPA FLORIDA AFTER BENDING OVER TO TIGHTEN A SCREW IN A CHAIR AT HOME. IT SEEMS I THREW MY BACK OUT PRETTY SEVERLY. I WAS ADMITTED BY DR. RANSENHOFF, THE CHIEF NEUROSURGEON. HE ORDERED A MYELOGRAM TO BE DONE 930414. THE FINDINGS WERE POSTERIOR EXTENSION OF DISK

MATERIAL AT L3 L4 CENTRALLY AND TO THE RIGHT. THE THECAL SAC AT L3 L4 IS SLIGHTLY DEFORMED. THERE IS MILD SPINAL STENOSIS L3 L4. THERE IS POSTERIOR EXTENSION OF DISK MATERIAL AT L4 L5 CENTRALLY AND TO THE LEFT. THE THECAL SAC IS ALSO LIGHTLY DEFORMED. THERE IS POSTERIOR EXTENSION OF DISK MATERIAL AT L5 S1 CENTRALLY WICH ABUTS THE NERVE ROOTS AND DEFORMS THE THECAL SAC. I WAS PLACED IN TRACTION WITH 15 POUNDS OF WEIGHT ON EACH PULLY I WAS TOLD TO EXPECT SOME INCREASE IN DISCOMFORT FOR THE FIRST DAY BUT IT WOULD PROVIDE EXCELLENT RELIEF BY THE SECOND DAY. THE FIRST SEVERAL HOURS THE PAIN DID INCREASE BUT NOT ONLY WAS IT IN THE LOW BACK AND LEGS IT SEEMED TO BE GOING ALL THE WAY UP TO MY NECK MORE SO ON THE LEFT SIDE. BY THE FIRST NITE THE PAIN WAS MUCH GREATER THEN ANY OF THE PAIN I HAD BEEN THROUGH TO THIS POINT. THE NURSE SAID IT WOULD BE ALRIGHT FOR ME TO COME OUT OF TRACTION IN THE EARLY A.M. OF THE FIRST NITE. THE NEXT DAY DR. YOON, A RESIDENT OF DR. RANSENHOFF, SAID I SHOULD STAY ON IT FOR A FEW MORE DAYS. SO TRACTION WAS CONTINUED THAT MORNING AFTER ROUNDS. I HAD ASKED DR. YOON IF HE KNEW WHY I HAD SO MUCH PAIN IN THE UPPER BACK. HE SID THAT HE COULD NOT EXPLAIN THE REASON FOR THE INCREASED PAIN. AFTER THE NEXT FEW HOURS THE SYMPTOMS WORSENED AND I WAS IN AND OUT OF TRACTION AS I COULD TOLERATE IT. BY THE SECOND DAY I TOOK MYSELF OUT OF TRACTION AND REFUSED TO GO BACK ON IT. AT THE TIME DR. RANSENHOFF FELT I WOULD BENIFIT MORE FROM TRIALS OF E.S.I. ANOTHER FORM OF STEROID INJECTION TO THE LOW BACK. I INFORMED HIM AT THE TIME THAT THESE TYPE OF INJECTIONS HAD NOT WORKED IN THE PAST. BUT

I WOULD TRY THEM IN THE BACK ANYWAYS. THESE SHORTS WERE SET UP FOR SEVERAL WEEKS LATER. I ALSO ASKED DR. RANSENHOFF WHY THE PAIN HAD INCREASED AND WENT SO HIGH IN THE BACK. HE COULD NOT TELL ME WHY BUT WHEN ASKED IF IT WOULD RELATE TO THE PARALISIS IN THE UPPER BACK HE COULD ONLY SAY NO AND NOT EXPLAINE. SO NOW I WAS BEING DISCHARGED NOT KNOWING WHAT COULD HAVE POSSIBLY CAUSED THESE DISKS TO GO SO QUICKLY. I ALSO TALKED TO DR. RANSENHOFF ABOUT MY NEUROMA PROBLEMS AND HE SAID THE ONLY TREATMENT WAS TO DO SURGERY. I HAD ENOUGH SURGERY AT THIS POINT AND TOLD HIM I WOULD PUT IT OFF FOR AS LONG AS I CAN.

930701 I HAD MY FORMAL HEARING AT FORT GORDON GEORGIA. THE HEARING TOOK NEARLY TWO HOURS AND THE P.E.B. FOUND ME UNFIT FOR DUTY AT 20%. I AS GIVEN SEVERANCE PAY AND ASKED TO RETURN MY MILITARY I.D. THIS MEANS I AM NO LONGER ABLE TO UTILIZE ANY SERVICES FROM THE MILITARY. THIS ALSO MEANS THAT MY DEPENDENT CHILDREN LOSE THEIR BENIFITS TO HEALTH CARE AS WELL. I AM CURRENTLY APPEALING THEIR DECISION AND AM WAITING MORE SPECIFIC METICAL DOCUMENTS TO SEND TO THE DEPARTMENT OF THE ARMY. AT THE TIME OF THE HEARING I HAD INFORMED THE BOARD THAT A NEAR FUTURE SURGERY WOULD BE NESSECARY TO RESOLVE SOME OF THE RESIDUALS FROM THE 910520 CABLE GRAFT. IT WAS EXPECTED I WOULD LOSE COMPLETE FUNCTION OF THE #11 CRANIAL NERVE AGAIN.

930805 I WENT BACK TO THE O.R. AT THE TAMPA VA.A TO HAVE A NEUROMA REMOVED AT THE GRAFT SITE IN THE NECK. I WAS UNDER THE IMPRESSION THAT IF A NEUROMA WAS INDEED PRESENT THAT THE DISEASED PORTION OF THE NERVE WOULD BE REMOVED AND THE REMAINING

NERVE ROOT WOULD BE TIED OFF TO PREVENT REGROWTH. ALL I WAS TOLD IS THAT A NEUROMA WAS REMOVED. NO TREATMENT OF THE NEUROMA WAS DISCUSED EVEN WHEN ASKING THE ATTENDING SEURGEON DR. FURGISON. SINCE THE SURGERY THE SENSITIVITY IN THE LEFT NECK HAS STARTED TO RETURN ALREADY. I FELL ALMOST CERTAIN THE NEUROMA WAS REMOVED AND THE NERVE LEFT UNTREATED.

930915 APROX. I STARTED TO RESEARCH THE CABLE GRAFT AND THE 60-70% CHANCE OF COMPLETE RECOVERY I WAS GIVEN. IN THE MEDICAL SECTION OF LESKOS POWER INFO I STARTED MAKING PHONE CALLS. AFTER NUMERIOUS CALLS TO NEUROLIGICAL INSTITUTES I FINALLY TALKED TO JOY IN THE RESEARCH DEPT. AT THE NATIONAL ORGINIZATION FOR RARE DISORDERS. IT SEEMED OF ALL THE RESEARCH CENTERS I HAD TALKED TO, NOONE HAD ANY INFO ON THE TYPE OF CABLE GRAFT I HAD DONE. AND GETTING SPECIFIC DATA HAS ALSO BEEN DIFFICULT. I AM STILL CURRENTLY OBTAINING FURTHER INFO TO TRY TO ESTABLISH THE COMMONNESS OF THE TYPE OF PROCEDURE I HAD RECIEVED.

THERE ARE TO MANY DOCTOR APPOINTMENTS TO LIST THEM ALL AS WELL AS CONFLICTING OPINIONS. ANY FURTHER DOCUMENTS IN MY CASE THAT YOU MAY NEED, OR ANY QUESTIONS FEEL FREE TO CONTACT ME.

SUMMARY OF PVT. JAMES R. FORGETTE'S MEDICAL HISTORY WHILE IN U.S. ARMY - 1991

910102 Pvt. Forgette was given full medical clearance for active duty in the U.S. Army. At that time complete physical showed no impairment of eyesight, hearing, limb movement or any other physical defects.

910123 Pvt. Forgette sworn into the U.S. Army as physically fit to serve and sent to Ft. Sill, Oklahoma with no physical limitations. He was assigned to Alpha 1/19.

910222 He was seen at T.M.C.#2 for an acute upper respiratory infection. He was given anti-biotics and two days bed rest, resuming fully duty Monday, 91025.

910225 Pvt. Forgette resumed full duty still feeling dizzy with cold symptoms, shortness of breath, headaches and nausea.

910303 When he awoke he noticed a mass on his left neck that had not been present the previous day. He was seen in the Emergency Room of Reynolds Army Community Hospital because of this mass. He was told this mass was because of cold symptoms and was released. While waiting for his drill sargeant, Sgt. Fowler, he used the rest room and passed out twice. Pvt. Forgette told lady at the E.R. desk, and she had physician examine him

again. (See Exhibit A).

910304 Since swelling did persist, Pvt. Forgette returned to T.M.C.#2 and was sent back to Reynolds Army Community Hospital by Major Burrell for CT scan of left neck. The CT scan was done and Major Vales read CT scan. He told Pvt. Forgette at that time he "had never seen anything like that" and he wanted to release him back to his unit. Major Vales questioned Forgette in the CT department about his activities prior to discovering mass. He asked what part of his training he was in and Forgette told him B.R.M. He told Major Vales that other than the cold and respiratory infection, he was in good health. They discussed whether or not firing could have caused an injury or problem in left neck and Pvt. Forgette thought it did not since he fired with right arm and he had not experienced any neck pain or swelling from it. He again stated the mass had appeared over night. A woman in CT scan (Radiologist? See Exhibit B Radiologic Consultation Request/Report form for name) strongly suggested Major Vales admit Pvt. Forgette to hospital for further observation. Major Vales seemed reluctant to do so, but finally, at the woman's insistance, he did admit him.

Admitted to hospital and put on antibiotics and IVs. He was under observation for the next few days.

910306 Major Vales discussed doing exploratory surgery with patient (Pvt. Forgette). - He told patient he was not sure of the nature of the mass. - Procedures would include small incision for a simple biopsy - "take a little piece of it out and see what it is". He explained it was a simple procedure and was noting to worry about.

910311 Surgery was performed on this date. (See Exhibit C, Operation Report).

910309 While making rounds, patient reported to Major Vales numbness of left side of head and ear. Major Vales replied, "I probably damaged or severed some nerves. It's a very difficult area with all the nerves and muscles and size of the mass. Do not worry, they will probably grow back." This comment was made in front of my hospital-mate, Pvt. Bobbit (7).

910311 Patient was discharged for 14 days convalescent leave. (See Exhibit D, Narrative Summary).

910317 Pvt. Forgette RACH in reference to pain and impairment of movement in left should he was experiencing. He talked to the nurse on 3West. She talked to Major Vales and told him against not to worry - that what he was experiencing was not unusual.

910325 Patient returned from convalescent leave to RACH to get permission to

return to Unit. He saw Major Vales outside first floor elevator. Again he stated loss of motion and a lot of pain and numbness in left shoulder, down chest and down back and in the left arm. Major Vales said "I probably severed some nerves, don't worry about it - they will regenerate." Forgette returned to his Unit, A. 1/19 with a profile stating no lifting, no running or jumping, etc.

910328 Patient returned to T.M.C.#2 because of pain and loss of motion in left shoulder area, and saw Lt. Col. Woerman. Lt. Col. Woerman referred Forgette to RACh to see dr. Parks for EMG findings. (See Exhibit E, Consultation) After the tests, Dr. Parks told patient it was probably too early to tell whether nerves were damaged in response to Forgette's telling him what Major Vales stated about possible nerve damage or severence. Dr. Parks stated to patient that time-wise, it was borderline at this time that the readings would be accurate since it takes approximately three weeks or more for a nerve to "die" or show loss of function. Advised that this test was to be repeated in two-three weeks.

910329 Forgette returned to t.M.C.#2 for physical therapy at request of Lt. Col. Woerman. Ultrasound treatment with heat was started. The results were increased pain and muscle spasms

left arm, shoulder and neck. This treatment was repeated for the next few days causing the pain and muscle spasms to increase further.

910401 Pvt. Forgette requested from Capt. Carney use of the swimming pool at Reinhart's Gym to try physical therapy on his own because ultrasound treatments at T.M.C.#2 caused more discomfort than aide. He started swimming with very little range of motion in left shoulder. By working some of the arm muscles it seemed to alieviate some of the pain after a few days of swimming.

Approx. 910404 Patient saw Major Vales in dining facility at RACH and after greeting, Major Vales asked, "How are you doing?" Forgette responded, "Not too good." Major Vales asked, "Are you still in a lot of paid?" Forgette said, "It's not so much the pain, they (T.M.C. doctors) think you severed some nerves." He said, "Yes, I did." Patient said, "Well, I can't move my shoulder very well now." Major Vales turned and walked away as if he had never seen patient sitting there. Forgette was having lunch with Pvt. Beasly and Pvt. Iannicceri who witnessed this entire conversation. Both made comments as to his hands shaking and could not believe he had performed surgery on Forgette.

910408 Pvt. Forgette went to see Major Burrell at TMC to discuss his

frustration as to the follow-up care by Major Vales. Patient felt a lack of concern on his part regarding the continuing problems since surgery. Major Burrell called Major vales personally and demanded that he provide Forgette with follow-up consultation ASAP.

An appointment was made for the afternoon. When Forgette arrived, Major Vales greeted patient with, "I am here to answer your questions, and she (indicating female assistant in the room) is here to provide a smile and keep you calm." After examination, Major Vales requested a neurosurgeon consult and referred patient to civilian, Dr. Woosley in the area. see Exhibit F, Major Vales follow-up report.) The appointment was set for three weeks later because of Dr. Woosley's full schedule.

910429 Patient saw Dr. Woosley. He could not make a proper evaluation without a second EMB and the pathology report which was not included in file from RACH. Dr. Woosley told Forgette damage was evident but severity was unclear without further information. (See Exhibit G, Woosley report.)

Dr. Smith had just returned from Saudi Arabia and was unaware of patient's history. He was unable to tell extent of the injury after a brief examination, but said he would immediately make arrangements for

Forgette to be medevaced to Ft. Sam Houston, Beach Pavilian Hospital, San Antonio, Tx. for evaluation.

910509 Forgette was admitted to Beach Pavilion Hospital.

910520 EMG studies were done and results showed totally severed spinal accessory nerve, left side. A 5-hour surgery was done this date taking a piece of nerve from leg and grafting it into neck. It will be six months and extensive physical therapy before it is known if the surgery was a success. These medical records were not available to him at the time he left for convalescent leave.

910526 Forgette was medevaced back to Ft. Sill on a 30-day convalescent leave after which he is to return to Beach Pavilian Hospital, fort Sam Houston, San Antonio, Texas for medical board review. It is believed, at this time, that he will be give a temporary disability retirement leave of one year.

THE ABOVE WAS DICTATED BY PVT. JAMES R. FORGETTE, 264-37-4855 on 910603, ST. PETERSBURG, FLORIDA. Present Florida address: 6450 31st Terrace North, St. Petersburg, Fl. 33710; phone: 813/345-7908 or 813/545-5511.

CONSTITUTIONAL PROVISION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militiary, when in actual service in time of War or public dander; nor shall any person subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 1346. The United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

CHAPTER 171--TORT CLAIMS PROCEDURE

28 U.S.C. §2671 *et. seq.* (1994)

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include an contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on

behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with law of the place where the act of omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written

approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's

authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise,or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by title shall be paid in a manner similar to

judgments and compromises of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2674. Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this

chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley authority is entitled under this chapter.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent

transmission of letter or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act omission of any employee of the Government in administering the provisions of section 1-31 of Title 50, Appendix.

(f) Any claim for damages caused

by the imposition of establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the

date of enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

TITLE IV--FEDERAL TORT CLAIMS ACT

(1946)

Part 1--Short Title and Definitions

Short Title

Sec. 401. This title may be cited as the "Federal Tort Claims Act."

Definitions

Sec. 402. As used in this title, the term--

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: Provided, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the Government"

includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Part 2--Administrative Adjustment of Tort Claims Against The United States

Claims of $1,000 or Less

Sec. 403. (a) Subject to the limitations of this title, authority is hereby conferred upon the head of each

Federal agency, or his designee for the purposes, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

(b) Subject to the provisions of part 3 of this title, any such award or

determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, not withstanding any other provision of law to the contrary.

(c) any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

(d) The acceptance by the claimant of any such award, compromise or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the

employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

Report

Sec. 404. The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this part. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim.

Part 3--Suits On Tort Claims Against The United States

Jurisdiction

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including

the United States district court for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January, 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private

individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the Untied States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: Provided, That the claimant may, upon fifteen days' notice

given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: Provided further, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claims presented the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

Procedure

Sec. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act March 3, 1887 (24 Stat. 505).

Review

Sec. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal--

(1) in the circuit courts of appeals in the same manner and to the same extent as other

judgments of the district courts; or

(2) in the Court of Claims of the United States:

Provided, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within three months after the entry of judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a

circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

(b) Sections 239 and 240 of the Judicial code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

Compromise

Sec. 413. With a view to doing

substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this part, after the institution of any suit thereon, with approval of the court in which such suit is pending.

Part 4--Provisions Common to Part 2 and Part 3

One-Year Statute of Limitations

Sec. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within on year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within on year after the date of enactment

of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to the section 410 of this title, if it would otherwise expire before the end of such period.

Exceptions

Sec. 421. The provisions of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a

statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, secs. 741-752,

inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit,

or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

Attorneys' Fees

Sec. 422. The court rendering a judgment for the plaintiff pursuant to part 3 of this title, or the head of the Federal agency or his designee making an award pursuant to part 2 of this title, or the Attorney General making a disposition pursuant to section 413 of this title, as the case may be, may, as a part of the

judgment, award, or settlement, determine and allow reasonable attorney's fees, which, if the recovery is $500 or more, shall not exceed 10 per centum of the amount recovered under part 2, or 20 per centum of the amount recovered under part 3, to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be guilty of a misdemeanor, and shall, upon conviction there, be subject to a fine of not more than $2,000 or imprisonment for not more than one year, or both.

Exclusiveness of Remedy

Sec. 423. From and after the date of enactment of this Act, the authority of any Federal agency to sue and be sued in its own name shall not be construed to authorize suits against such Federal agency on claims which are cognizable under part 3 of this title, and the remedies provided by this title in such cases shall be exclusive.

Certain Statutes Inapplicable

Sec. 424. (a) All provisions of law authorizing any Federal agency to consider, ascertain, adjust, or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, are hereby repealed in respect of claims cognizable under part 2

of this title and accruing on and after January 1, 1945, including, but without limitation, the provisions granting such authorization now contained in the following laws:

Public Law Numbered 375, sixty-seventh Congress, approved December 28, 1922 (42 stat. 1066; U.S.C., title 31, secs. 215-217).

Public Law Numbered 267, sixty-sixth Congress, approved June 5, 1920 (41 Stat. 1054; U.S.C., title 33, sec. 853).

Public Law Numbered 481, Seventy-fourth Congress, approved March 20, 1936 (49 Stat. 1184; U.S.C., title 31 sec. 224b).

Public Law Numbered 112, as amended, Seventy-eighth Congress, approved July 3, 1943 (57 Stat. 372; title 31, secs. 223b, 223c, and 223d).

Public Law Numbered 182, as amended, Sixty-fifth Congress, approved July 1, 1918 (40 Stat. 705; U.S.C., title 34, sec. 600).

Section 4 of Public Law Numbered 18, Sixty-seventh Congress, approved June 16, 1921 (42 Stat. 63), as amended by Public Law Numbered 456, Seventy-third Congress, approved June 22, 1934 (48 Stat. 1207; U.S.C., title 31, sec. 224c).

(b) Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office

or employment, or any other claim not cognizable under part 2 of this title.

MILITARY PERSONNEL CLAIMS ACT, July 3, 1943, c. 189, 57 Stat. 372

AN ACT

To provide for the settlement of claims for damage to or loss or destruction of property or personal injury or death caused by military personnel or civilian employees, or otherwise incident to activities, of the War Department or of the Army.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War, and, subject to appeal to the Secretary of War, such other officer or officers as he may designate for such purposes and under such regulations as he may prescribe, are hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess

of $500, or in time of war not in excess of $1,000, where accepted by the claimant in full satisfaction and final settlement, any claim against the United States arising on or after May 27, 1941, when such claim is substantiated in such manner as the Secretary of War may by regulation prescribe, for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel or civilian employees of the War Department or of the army while acting within the scope of their employment, or otherwise incident to noncombat activities of the War Department or of the Army, including claims for damage to or loss or destruction, by criminal acts, of registered or insured mail while in the possession of the military authorities, claims for damage to or loss

or destruction of personal property bailed to the Government and claims for damages to real property incident to the use and occupancy thereof, whether under a lease, express or implied, or otherwise: Provided, That the damage to or loss or destruction of property, or the personal injury or death, shall not have been caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee. No claim shall be settled under this Act unless presented in writing within one year after the accident or incident out of which such claim arises shall have occurred: Provided, That if such accident or incident occurs in time of war, or if war intervenes within one year after its occurrence, any claims may on good cause shown be presented within one year after peace is established. The amount

allowed on account of personal injury or death shall be limited to reasonable medical, hospital, and burial expenses actually, incurred, except that no payment shall be made to any claimant in reimbursement for medical or hospital services furnished at the expense of the United States nor, in the case of burial, of such portion of the expense thereof as may be otherwise paid by the United States. Any such settlement made by the Secretary of War, or his designee, under the authority of this Act and such regulations as he may prescribe hereunder, shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary. The provisions of this Act shall not be applicable to claims arising in foreign countries or possessions thereof which are cognizable under the

provisions of the Act of January 2, 1942 (55 Stat. 880; 31 U.S.C. 224d), as amended, or to claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury, or death occurs incident to their service. The Secretary of War may report such claims as exceed $500, or in time of war $1,000, to Congress for its consideration.

Sec. 2. Such appropriations as may be required for the settlement of claims under the provisions of this Act are hereby authorized. Appropriations available to the War Department for the settlement of claims under the provisions of other laws shall be available for the settlement of claims of the same character under the provisions of

this Act.

Sec. 3. That portion of section 1 of the Act of august 24, 1912 (37 stat. 586), reading as follows:- "Provided, That hereafter the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to vessels, wharves, and other private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out

of appropriations that may be made by Congress therefor.", is hereby repealed.

Sec. 4. The Act of December 28, 1922 (42 stat. 1066; 31 U.S.C. 215-217), shall hereafter be inapplicable to the War Department.

Sec. 5. Section 4 of the river and Harbor act, approved June 25, 1910 (36 Stat. 676, as amended by the Act of June 5, 1920 (41 Stat. 1015; 33 U.S.C., 564), is hereby repealed.

Sec. 6. The act of March 3, 1885 (23 Stat. 350), as amended by the Act of July 9, 1918 (40 Stat. 880), and by the Act of March 4, 1921 (41 Stat. 1436), is hereby amended by adding, after section 5, the following sections:

"Sec. 5a. Any authorization or direction in this Act to the Secretary of War, and any reference herein to a

decision, declaration, or other action by the Secretary of War, shall include authorization or direction to, and action by, as the case may be, such other officer or officers as he may designate for such purposes, acting under such regulations as he may prescribe, shall be final and conclusive for all purposes, not withstanding any other provisions of law to the contrary."

"Sec. 5b. The provisions of this Act shall be applicable also to civilian personnel and civilian employees of the War Department or of the Army, including such personnel and employees engaged on civil works."

Sec. 7. The Act of February 13, 1936 (49 Stat. 1138; 31 U.S.C. 224a), shall hereafter be inapplicable to acts of officers, enlisted men, and employees of

the Army and officers, employees, or agents of the War Department.